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From: "Obegi, Doug"
Sent: Tue 7/10/2012 1:44:25 AM
Subject: Certainty of mitigation measures and BDCP
Swan v. Turner, 824 F.Supp. 923, 932 (D.Mont.1992)

I recently reviewed the Northern Plains decision that someone suggested we review, and I agree there is some useful language in that decision regarding the requirement to quantify and identify the environmental impacts under NEPA, in order to fulfill the public information purpose of NEPA (the Ninth Circuit's decision in that case essentially held the NEPA document can't just say you'll mitigate later without actually identifying and quantifying the impacts in the NEPA document itself). Equally important, in my humble view, is the district court's holding in Center for Biological Diversity v. Rumsfield, 198 F.Supp.2d 1139 (D. Ariz. 2002) regarding the identification and certainty of mitigation measures under the ESA. That case dealt with the requirement that,

"To avoid a substantive violation of the prohibition against jeopardy, the agency must develop mitigation measures-either as part of the proposed project or as RPAs in the biological opinion. 16 U.S.C. § 1536(a)(2). Mitigation measures must be reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards. Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir.1987). The question before this Court is whether or not the Final BO meets these criteria."

This substantive requirement of the ESA was at issue in the Kempthorne and Gutierrez decision (OCAP cases); in those cases the focus was on whether the mitigation measures (e.g., Delta Smelt Working Group recommendations) were reasonably certain to occur. In Rumsfield, the district court concluded that the agency violated the ESA by relying on plans that were to be developed in the coming years to mitigate impacts, when those plans did not include specific measures, dates for implementation, etc. As the court wrote,

"The whole premise of the "no jeopardy" ruling, which is that within three years the Army and other interested parties will come up with a long-term plan to remedy the groundwater deficit problem, is an admission that what is currently on the table as far as mitigation measures is inadequate to support the FWS's "no jeopardy" decision. The FWS is looking to the plans, the AWRMP and the RWRMP, to be prepared within three years, to identify the necessary mitigation measures, which will prevent adverse impact to the water umbel and willow flycatcher. These measures, however, have to be identified and included in the Final BO, either as RPAs or incorporated into the Army's proposed action, to support a "no jeopardy" decision. Without these measures, there is no factual basis and no rational basis for the opinion.

The Army may not delay identifying the measures necessary to mitigate the effects of its ten-year plan based on the monitoring provisions in the Final BO nor on the short-term benefits of the Sierra Vista

recharge project."

The Court also acknowledged that the BiOp must analyze the entire agency action and generally cannot segment the analysis, but acknowledges that there can be ways for the agency to structure ESA review, stating that, "This is not like Swan v. Turner, 824 F.Supp. 923, 932 (D.Mont.1992), where FWS structured its review, envisioning future ESA evaluations at the developmental stages of specific projects, after adoption of the biological opinion, which included standards and guidelines to protect species and habitat."

Gee… does this sound at all like the BDCP framework?

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